

The Scope of Family Court Intervention

Increased societal and legislative attention to child abuse, substance abuse, domestic and relationship violence, child support collection, and other related issues, along with efforts to improve public access to the court system, has had the result that these issues frequently arise in family court. The California Family Code has simultaneously evolved by increasingly emphasizing the safety of children and family members when the family court is making child custody and visitation decisions.¹ Consequently, family court has become an important arena for dealing with these problems when they arise in child custody and visitation proceedings.

But the family court system was not intended or designed to assume this level of responsibility for the safety of children and family members, a function traditionally more suited to the juvenile dependency court and the child welfare department. The family court system does not possess the philosophical orientation or logistical infrastructure necessary to perform this function effectively, and so a family court must implement innovative programs to address abuse and domestic violence. The court's success in addressing these problems depends on judicial interest and leadership, the initiative of Family Court Services, and the court's willingness to collaborate actively with government and community agencies and support services that have the resources to deal with child abuse and neglect, domestic violence, and substance abuse. This judicial interest and action is appropriate and clearly consistent with the intent and spirit of the requirements of the Family Code as they have evolved over time.

In advocating an expanded scope of the family court to deal with family dysfunction, this article first reviews the traditional roles and functions of the family and juvenile dependency courts and discusses how the role of the family court has changed as a function of the changing Family Code. It then takes up the question whether the roles and functions of the two courts continue to be essentially distinct and unique or whether they overlap in cases involving seriously troubled families.

HISTORICAL DIFFERENCES BETWEEN THE JUVENILE DEPENDENCY AND FAMILY COURT SYSTEMS

Judge Leonard P. Edwards laid a foundation for this discussion in a 1987 *Santa Clara Law Review* article that began exploring the scope of family court intervention within the context of the related legislation and case law in

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The family court was not designed or structured to help families contesting child custody and visitation with the serious problems that they frequently present—problems such as substance abuse, child abuse and neglect, and domestic violence—when these problems have not risen to the extremely high threshold demanding juvenile dependency action. Nevertheless, these problems substantively undermine the health, safety, and welfare of children and the safety of other family members. This article takes the position that the family court system has a responsibility to develop a philosophical orientation and structure that reflect an understanding of the nature and complexity of these problems and a willingness to use its authority to help families confront them. ■

effect at that time. He explained that, though both resolve family and child custody issues, the family and juvenile courts are fundamentally different.²

The family court was created to provide a forum for private litigants to resolve their disputes over their marriages and the custody, care, and control of their children. In family law, parents are presumed to be capable of making decisions regarding their children. When parents do contest custody, the state intervenes only minimally, having established a framework of rules. These guide the court in resolving disputes in the best interest of the child while promoting parental sharing of rights and responsibilities. Family courts do, of course, perform other functions, including making protective orders, but these are ancillary to the court's primary dispute resolution function.³

The juvenile court, on the other hand, was created to protect children from abuse and neglect as well as, to the extent possible, to preserve and strengthen the family. Questions about parents' or guardians' ability to make decisions regarding their children are the starting point of juvenile court proceedings. The state aggressively intervenes by taking formal action to modify parents' behavior and even to remove the children from the parents' home and care. The court, too, takes an assertive role, making a variety of orders to protect the child and ensure that other public and private entities provide services to the child and his or her family. Like the family court, the juvenile court also performs ancillary functions such as making child custody and visitation orders.⁴

Judge Edwards noted the preference of the Legislature and courts for parents to decide issues regarding their children without state involvement. Only when parental child care drops below a minimal level does the state intervene in the parents' decision-making process. But if the parents agree about child custody and care for their children satisfactorily, then the state and the family court have limited ability to modify a custody arrangement that is not in the best interest of the child. Because parents come to family court voluntarily and are free to resolve some or all of their disagreements privately, the court may only be

able to approve the agreement or try to persuade the parents to change it even if it learns of the agreement during a dissolution proceeding. "In short," wrote Judge Edwards, "the family court is poorly equipped to speak for or protect the child. The presumption of parental fitness means the court need not and should not be concerned with the child. The court assumes the parents will see to the child's needs."⁵

It is important to note here that parents and their attorneys—not the children or the state—drive family court cases. Parents and other adult parties initiate action in the family court system. It is they who speak with the loudest voice. It is they who determine whether they will remain in or exit the family court system. If both parties decline to participate in the family court process, regardless of the severity of the problems affecting the children, and if the local child protection agency is unable or unwilling to intervene by filing a petition in juvenile court or providing services, there is little the family court can do to protect the children. The children, with the exception of those few for whom attorneys have been appointed in family court, do not have legal advocates and therefore have no independent voice to communicate their interests and needs. The family court may attempt to do everything within its power—through parent education, mediation, other alternative dispute resolution mechanisms, and evaluation—to encourage families to focus on the best interest and safety of their children, but in actuality it is left to the parties' discretion whether to maintain that focus.

THE APPROPRIATE LEVEL OF FAMILY COURT INVOLVEMENT

In addition to the historical factors, there are important practical and philosophical reasons to limit the family court's intervention in child custody and visitation disputes. First and foremost, limited judicial intervention allows the family to maintain its own decision-making authority. Second, protracted involvement with the court system can exacerbate the disagreements that brought the family into

court, drain the family's resources, and cause significant stress for all family members. The effects of all this tension may be deep and lasting for the children. And third, the outcomes may be unexpected and unwanted by one or both parents.

Thus, except in the event of emergencies or safety issues requiring immediate investigation, recommendations, and other critical assistance, the family court should begin with the least intrusive level of involvement to help families resolve their disputes. This usually consists of education about the various needs of children and family members and methods by which parents can resolve their disputes to serve the best interest of their children and ensure family members' safety. The next least intrusive means of assisting parents are confidential, nonrecommending mediation and other minimally intrusive, child-focused alternative dispute resolution mechanisms, such as a combination of properly informed, initial attempts at mediation with the additional step that the mediator moves into an investigating and recommending mode, referred to as "recommending mediation" in California's Family Code.⁶

These services are all that a significant proportion of family court clients require to resolve their disputes and exit the system.⁷ However, when serious problems—including child abuse or neglect, domestic and relationship violence, or substance abuse—exist and show no evidence of resolving without the court's active intervention, the family court must pay close attention to them and may appropriately direct the parents and other parties to obtain assistance aimed at effectively addressing their problems and improve their parenting capacity. Indeed, research indicates that it is, in fact, naïve and sometimes dangerous to assume that parental inadequacy is seldom an issue in family court cases.⁸

THE RESPONSIBILITY ASSIGNED BY THE FAMILY CODE

Significant changes to the Family Code since the 1987 publication of Judge Edwards's article have functioned to clarify the "best-interest" standard as it

applies to family court proceedings.⁹ The code now places greater responsibility on the family court to ensure the safety of not only the children but also "all family members,"¹⁰ giving more focus and weight to issues related to domestic violence, substance abuse, and child abuse in general and child sexual abuse in particular in the court's determination of the child's "best interest."¹¹ Given the numerous changes in the Family Code pointing in this direction, one may conclude that evidence of family violence or child abuse is inconsistent with a presumption of parental adequacy.

WHAT IS THE "BEST INTEREST" OF CHILDREN?

Family Code section 3011 requires the court, in determining a child's best interest, to consider the health, safety, and welfare of the child; any history of abuse by one parent or any other person seeking custody against essentially any child, the other parent, or almost anyone else with whom that person has had a relationship; the nature and amount of contact with both parents except in certain circumstances; and the habitual or continual illegal use of controlled substances or alcohol by either parent.¹²

The General "Health, Safety, and Welfare" Factors

The child's health, safety, and welfare are the first of section 3011's enumerated factors that the court must consider in its determination of best interest. These terms are far more general than the section's other, more specific factors, which are presumably consistent with health, safety, and welfare considerations. But "health, safety, and welfare," though listed as a single separate factor, are not operationally defined. Other sections of the Family Code, as well as the California Rules of Court, help clarify for the the court or the child custody mediator or evaluator what additional information beyond that discussed in the more specific factors is relevant to the assessment of a child's health, safety, and welfare.

Family Code section 1815 lists the knowledge areas required of conciliation (Family Court Services) counselors: adult psychopathology, the psychology

of families, child development, child abuse, clinical issues relating to children, the effects of divorce and domestic violence on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.¹³ Section 1816 requires counselors to receive continuing education in domestic violence, including child abuse, and further requires thorough training in specified subject areas regarding domestic violence.¹⁴ Rule 5.230 of the California Rules of Court further delineates domestic violence training requirements for court-appointed investigators and evaluators.¹⁵ Rule 5.215 applies these same training requirements to all contract and employee mediators, evaluators, investigators, and counselors who provide services on behalf of Family Court Services.¹⁶ Thus, even before a judicial officer or court staff member addresses section 3011's more specific factors, the knowledge and training requirements for Family Court Services and court-connected custody evaluators, which presumably are intended to prepare them to assess the "health, safety, and welfare of the child," place a heavy emphasis on domestic violence and child abuse, followed by, in no particular order, consideration of the psychological functioning of children and family members, the developmental and mental health needs of children, and the impact of divorce on children within the context of the related child custody research.

Rule 5.225 lists even more specific training requirements for court-appointed investigators and evaluators assigned to make recommendations to the court regarding the best interest of children. These training areas include, but are not limited to, family dynamics, including parent-child relationships, blended families, and extended family relationships; the effects of separation, divorce, domestic violence, child sexual abuse, child physical or emotional abuse or neglect, substance abuse, and interparental conflict on the psychological and developmental needs of children and adults; the assessment of child sexual abuse issues; the significance of culture and religion in the lives of the parties; general mental health, medication use, and learning or physical disabilities;

the assessment of parenting capacity; and the construction of effective parenting plans.¹⁷

Rule 5.220 requires custody evaluators to consider additional factors, including the quality of the child's attachment to each parent and the parents' social environment; the child's reaction to the separation, divorce, or parental conflict; the parents' capacity for setting age-appropriate limits and for understanding and responding to the child's needs; the parents' history of involvement in caring for the child; and the parents' history of psychiatric illness.¹⁸

All of these various factors, as well as section 3011's other, more specific factors, are, then, legitimate issues to be considered, analyzed, and weighed in considering the "health, safety, and welfare of children." But the weight and priority of these various factors is not entirely up to the judicial officer or court staff member. The Family Code makes clear that some should be weighed more heavily than others.

Specially Weighted Factors

As noted above, Family Code section 3011 singles out three issues for special attention by the court beyond the general consideration of "health, safety, and welfare" in its determination of the child's best interest, and by doing so assigns them increased weight: (1) the nature and amount of contact that the child has had with both parents; (2) either parent's habitual or continual alcohol or illicit drug abuse; and (3) any child abuse and adult relationship violence.

Section 3011(e)(1) goes on to assign even more weight to two of these three issues—substance abuse and child, domestic, or relationship abuse—by placing an added burden on the court: it requires that when these allegations have been made against a parent and the court orders sole or joint custody to that parent, the court must "state its reasons in writing or on the record."¹⁹ Therefore, child, domestic, and/or relationship abuse and substance abuse appear to be weighted more heavily than all other factors. But abuse, in the form of child abuse and domestic violence,²⁰ is the most heavily weighted of the factors.

Abuse—The Most Heavily Weighted Factor

Section 3041 of the Family Code requires a court, before granting custody to someone other than a child's parent without the consent of the parents, to find that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is necessary in order to serve the child's best interest.²¹ In section 3020(a) the Legislature specifically finds that "the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child...."²² Therefore, because detriment resulting from parental custody must be shown before the court can award custody of a child to a nonparent, and the Family Code defines child abuse or domestic violence in a household where a child resides as detrimental to the child, such abuse is the most heavily weighted factor in determining a child's best interest.

Section 3020(c) clarifies this policy by requiring a court, when facing a conflict between maintaining parental custody or contact and protecting the health, safety, and welfare of the child, to order custody and visitation in a way that ensures the latter as well as the safety of all family members.²³ Finally, section 3044 establishes a rebuttable presumption that an award of custody of a child to a person who has committed domestic violence is detrimental to the best interest of the child as defined in section 3011.²⁴

Even within the heavily prioritized area of child abuse, allegations of child sexual abuse receive special attention. The code provides that the court may request a child welfare department investigation if allegations of child sexual abuse arise during a custody proceeding²⁵ and mandates that the court require an evaluation meeting certain minimum requirements in any contested custody or visitation proceeding in which the court has appointed an evaluator or referred the case for evaluation *and* has determined that there is a serious allegation of child sexual abuse.²⁶ This is the only situation in which the Family Code mandates that the court require an evaluation. The requirements for both the manner in which this evaluation must be conducted and the

training of the evaluator are extraordinarily specific and thorough.²⁷

AUTHORITY AND RESPONSIBILITY OF THE FAMILY COURT BEYOND DETERMINING CUSTODY AND VISITATION

The question then arises whether the family court may consider child abuse, domestic and relationship violence, and substance abuse only for the purpose of determining child custody and visitation or has the authority—if not the responsibility—to help families constructively address those problems. The latter appears to be the case. Section 3190 authorizes the court to require parents and other parties involved in custody or visitation disputes, and the children at issue, to participate in mental health counseling, including substance abuse services, if the custody or visitation dispute poses a substantial danger to the best interest of the child and the court determines that the counseling is in the child's best interest.²⁸ Section 3191 then lists the purposes of mental health counseling orders, one of which is to improve each parent's parenting skills.²⁹

Section 3200 also recognizes the dangers posed by abuse by requiring the Judicial Council to develop standards for supervised visitation providers, including guidelines for cases involving allegations of domestic violence, child abuse, substance abuse, or other special circumstances.³⁰ The resulting standards are now included in section 26.2 of the California Standards of Judicial Administration, which took effect January 1, 1998.³¹

Section 3203, added in 1999, authorized the family law division of the superior court in each county to establish and administer a supervised visitation and exchange program, educational programs about protecting children during family disruption, and group counseling programs for parents and children.³²

Clearly, then, the people of California, through their legislators, have acknowledged that certain social problems—specifically family and relationship violence, child abuse, substance abuse, and the related

safety needs of family members—are the most important concerns when a court makes decisions about child custody and visitation. The Family Code, California Rules of Court, and California Standards of Judicial Administration all require courts and the mediators and domestic relations investigators who work for them to pay special attention to these issues and weigh them heavily. The Family Code gives the court the authority to order people into various kinds of educational and counseling programs, as well as to order supervised visitation, to protect the safety of children and other family members and to improve parenting skills. But how often do family courts have to deal with these problems, which juvenile dependency courts and child protection systems are better equipped to address? Are they a rare or frequent occurrence in family courts?

RESEARCH ON MULTIPROBLEM FAMILIES IN FAMILY COURT

The Judicial Council's Center for Families, Children & the Courts (CFCC) noted the family court's adaptation in response to the serious problems often raised in court-based mediation of contested custody cases in its *Statewide Uniform Statistical Report System (SUSRS) 1996 Client Baseline Study*. SUSRS 1996 statistics showed that parents raised concerns about physical or sexual child abuse, child neglect or abduction, substance abuse, or domestic violence in over half of all mediation sessions. In 30 percent of all cases, more than one of these matters arose.³³ Substantial proportions of cases in mediation reported current or past restraining orders (55 percent), a past child welfare services investigation (25 percent), problems with alcohol or drug abuse (30 percent), and a child's having witnessed violence between the parents (41 percent).³⁴

Effective case disposition for families dealing with multiple problems demands unprecedented expertise from the courts. *Justice in the Balance: 2020*, the 1993 report of the Commission on the Future of the California Courts, pointed out the critical need for

services and recommended that the courts advocate for the mobilization of community services for families.³⁵ Many cases entering family court require referrals or orders to ancillary human services. In addition, parenting plans for families affected by child abuse, domestic violence, or substance abuse may need to include arrangements for supervised visitation. To provide these services, courts and communities need to develop innovative collaborative partnerships.

It is clear, then, that many families in California's family court system are suffering from child abuse and neglect, substance abuse, and domestic violence. The Judicial Council of California recognizes that fact and has provided local jurisdictions with grant funding to develop services such as supervised visitation and drug treatment courts. But does the mere presence of these problems harm or endanger children? Does the evidence warrant the family court's active intervention?

RESEARCH ON THE IMPACT OF CHILD ABUSE, DOMESTIC VIOLENCE, AND SUBSTANCE ABUSE ON CHILDREN

Emotional, physical, and sexually abusive behavior is frequently alleged in family court cases, and its impact on child development is well documented.³⁶ Jeffrey L. Edleson recently reviewed 84 studies reporting the effects on children of witnessing domestic violence and identified 31 of those studies as meeting the criteria of rigorous research.³⁷ These studies documented multiple problems among children that are significantly associated with witnessing assaults of one parent by another in the home, including

- psychological and emotional problems such as aggression, hostility, anxiety, social withdrawal, and depression
- cognitive functioning problems, such as lower verbal and quantitative skills, and the development of attitudes supporting the use of violence
- longer-term developmental problems, such as depression, trauma-related symptoms, and low

self-esteem among women and trauma-related symptoms among men.³⁸

Edleson's examination of the research discloses that these problems appear to be moderated by a number of factors, such as the child's age, sex, degree of family support, and perception of his or her relationship to adults in the home.³⁹ Though he concludes that the studies provide "strong evidence" that children who witness violence at home experience a host of problems, Edleson does caution that significant numbers of children showed no negative developmental problems from witnessing violence and that one must be careful not to assume that witnessing domestic violence automatically leads to negative outcomes for children.⁴⁰

The California courts have generally accepted this research, taking the view that domestic violence harms children. California juvenile dependency case law holds that children who are exposed to violent confrontations between their parents or caretakers may be adjudged dependents of the juvenile court. The California Court of Appeal in *In re Benjamin D.* noted that "[b]oth common sense and expert opinion indicate that spousal abuse is detrimental to children."⁴¹ The appellate court expanded this view in *In re Heather A.*, recognizing that domestic violence poses a risk of both physical and emotional harm to children, as well as leaving them open to long-term psychological harm.⁴²

Finally, numerous studies indicate that substance-abusing parents are at increased risk for abusing and neglecting their children.⁴³ In a 1999 survey of the 50 state child welfare departments, 85 percent of the responding states reported substance abuse as one of the two leading problems exhibited by families reported for child maltreatment.⁴⁴ Parental substance abuse has also been linked to child fatalities: substance abuse by parents and other caregivers is associated with up to two-thirds of all cases of child maltreatment fatalities.⁴⁵

Several studies indicate that past, as well as current, parental substance abuse increases the risk of child abuse. Robert Ammerman et al. found a strong

linkage between a lifetime history of substance abuse and child abuse potential in both mothers and fathers.⁴⁶ These same researchers found no differences in abuse potential between those with a past (but not current) history of substance abuse and those with a current substance abuse disorder. Richard Famularo et al. found that mothers with either a current or past substance abuse history were more likely to abuse their children than non-substance-abusing mothers.⁴⁷ These findings go against the commonly held belief that getting substance-abusing parents to get clean and sober is sufficient to reduce the risk of future child maltreatment. At base, this and other research clearly supports the position that child abuse and neglect, substance abuse by parents and caretakers, and domestic violence harm children or place them at serious risk of being harmed compared to children who are not exposed to such problems.

CONCLUSIONS FROM THE RESEARCH, THE LAW, AND EXPERIENCE

The majority of parents appearing in family court, even though they have differing perspectives on custody and visitation and may have experienced difficulties affecting their parenting capacity at one time or another, are able to focus on the best interest of their children, adequately care for their children, and protect them. A significant minority of parents, however, experience serious difficulties that interfere with their ability to adequately care for and protect their children.⁴⁸ In cases involving these parents, the family court needs to step beyond traditional dispute resolution to take a more active role.

THE APPOINTMENT OF ATTORNEYS FOR CHILDREN IN FAMILY COURT

One way for the court to gain more information about a family's problems and take effective remedial action is to appoint an attorney for the child in a custody case, though this can be costly and sometimes

controversial. The Family Code authorizes a court, if it determines that it would be in the child's best interest, to appoint private counsel to represent the interest of the child in a custody or visitation proceeding.⁴⁹ In Santa Clara County, Family Court Services regularly requests appointment of an attorney for the children in cases where both parents appear to have parentally debilitating issues (i.e., serious substance abuse/dependency and/or domestic violence, child abuse, or neglect) and in which the child welfare department declines either to file a petition or to provide services.⁵⁰

The family court, unlike the juvenile dependency court, does not have the authority to order an agency to provide needed services to a family. If a family's problems do not cross the severity threshold required by juvenile dependency court⁵¹ and the family's dispute therefore remains in the family court system, the family court can order only that the adults in the family seek out and obtain services to address the identified problems. The family court and Family Court Services are currently neither authorized nor equipped to closely and actively monitor families suffering from problems that place their children at risk. After ordering parents to engage themselves and their children in services, the court is able only to review the level of compliance and progress made in addressing those issues. This can be an effective measure if the parents comply and appear for court-ordered reviews, but not if they fail to comply or appear.

Attorneys appointed to represent children in family court can provide considerable assistance in high-risk situations. First of all, they can serve as an effective voice for the needs of their clients and actively represent their best interest in the legal arena. A complicating issue, however, is that children's attorneys in custody cases are often asked to serve a function that exceeds their legal expertise and training: to monitor the health, safety, and welfare of their young clients because there is no one else to do it. Some attorneys, by disposition, experience, and training, are well suited to this role and are capable of taking assertive action to see that their clients are receiving the care and assistance they require. Their

participation in a case may not only further the interests of the children they represent, but can also serve to support the other family members and reduce the level of conflict in the family. These attorneys make extremely important, and often unappreciated, contributions to preserving the health, safety, and welfare of the children they represent.

The result, however, is not always productive or positive. Some parties may view a minor's attorney who vigorously advocates for his or her client as interfering, as abusive of his or her power, or as exploiting the appointment for financial gain. A parent may view the attorney as nonsupportive of his or her position and, therefore, as an adversary. In addition, some attorneys may be unsuited for this type of appointment. Their involvement can be damaging, either through lack of interest and appropriate involvement, lack of appropriate training in or sensitivity to the issues involved, or a quality of participation that serves to aggravate the problems being experienced by the children they represent.

There are other potential problems associated with the appointment of attorneys for children: it is costly to the parties, the court system, or both, and can add to the stress experienced by already burdened and distressed parents, resulting in an atmosphere of increased hostility and acrimony within the family and in the family's contacts with the court system.

THE POTENTIAL FOR USING COURT APPOINTED SPECIAL ADVOCATES IN FAMILY COURT CASES

An alternative to appointing an attorney for a child may be to appoint a Court Appointed Special Advocate (CASA), a trained volunteer typically appointed by the juvenile court to help define the best interest of a child in juvenile court dependency and wardship proceedings.⁵² A number of jurisdictions around the country have used community volunteer child advocates in divorce proceedings over the years.⁵³ Santa Clara County Family Court and selected cases benefited from a grant received by Child Advocates of Santa Clara and San Mateo Counties that permitted

the program to provide 50 CASA volunteers to family court families from 1992 to 1996.⁵⁴ It is worth noting, however, that the CASA program, after providing family court volunteers for about six months at no cost to the court or to the families, contacted Family Court Services and requested special training for their volunteers because they found family court families far more difficult to deal with than families in the juvenile dependency system for two primary reasons.⁵⁵ First, the high level of parental conflict and acrimony that pervaded many of the cases made it particularly difficult for the advocates to get the parents to focus on the child's needs. Second, the parent who had custody of the child often had little motive to cooperate with the advocate, was more likely to view the advocacy as interference, and therefore, on occasion, would actively undermine the advocate's role.

Even so, the experimental program was determined to be generally successful. Interested and motivated volunteers were able to provide the time and support available nowhere else. Examples:

- A retired parole officer supervised visitation for a child who wanted contact with her mother. The mother had been criminally convicted, had a violent history, and was in drug treatment.
- Many CASAs provided frequent monitoring of the children's health, safety, and welfare; supervised parent-child contacts; and submitted reports to the court.
- A husband-and-wife CASA team helped a parent who was the victim of domestic violence obtain a restraining order and support services.
- A CASA helped a parent previously accused of abusing and medically neglecting his children to get the children to their medical appointments.
- A CASA helped a parent obtain job training and subsequent employment.

The use of CASAs appears to be an intervention well suited to the needs of families in cases where children are at high risk, although special training may be required.

POTENTIAL PROBLEMS OF ACTIVELY ADVOCATING FOR CHILDREN IN FAMILY COURT

Some local jurisdictions across the state have assertively attempted to implement the Family Code's growing emphasis on child safety by appointing attorneys to represent children in high-risk situations or by consistently ordering interventions, including counseling, domestic violence services, chemical dependency treatment, and supervised visitation. But by imposing those interventions, which are, by their very nature, intrusive and costly, courts have increased their visibility and vulnerability to criticism. People do not expect these types of interventions from a family court system designed to resolve disputes between parents who are presumed to be competent and capable of adequately caring for their children. Family court professionals must therefore take a more active role in educating parents, members of the family law community, mental health professionals involved in child custody and visitation work, and agencies and community resources about the family court system and how it works, the frequency and severity of the various problems commonly arising in family court, and the court's responsibility to actively address those problems. These various stakeholders need to understand the court's focus on the best interest of children; the factors the court takes into consideration in determining best interest, including evidence of child abuse and neglect, domestic and relationship violence, and substance abuse; the court's role in preserving the safety of children and family members; and the court's authority and responsibility for exercising the various prerogatives authorized by law.

FAMILY COURT'S INTERACTION WITH THE CHILD WELFARE DEPARTMENT

Family Court Services frequently must report suspected child abuse or neglect to the local child welfare department, and on many of these occasions Family Court Services staff have viewed the quality

of the agency's response as appropriate. This is not, however, always the case. Family Court Services personnel often have reported incidents of what they consider serious suspected child abuse or neglect but have observed that the agency has often dismissed the reports, responding that it will not take formal action because "this is a family court case," as if this context almost automatically signals a false or exaggerated allegation raised by a disgruntled parent for potential secondary gain in a custody battle. Family court personnel usually take a different view. They frequently face situations in which neither parent appears capable of adequately caring for the child, yet the child welfare department declines to investigate, offer services, or file a juvenile dependency petition.

In Santa Clara County, the family court, juvenile dependency court, Department of Family and Children's Services, Office of County Counsel, and Family Court Services have attempted to address this issue and maximize the appropriateness and effectiveness of the system's response to these cases by collaborating to develop a detailed *Protocol for Family Court and Child Protective Services When Issues of Child Abuse or Neglect Surface in Family Court Proceedings—July 2002*. The protocol has served to clarify each system component's responsibilities and improve the system's responsiveness to families; moreover, the collaboration and communication inherent in developing and implementing the protocol have also served to maximize the effectiveness of ongoing working relationships among system members and increase sensitivity to the assets and limitations of what each system component has to offer.⁵⁶

The changing law and increased community and cultural awareness of family and relationship violence and substance abuse and their impacts on victims and children have resulted in the need for family court at times to assume some of the functions of the juvenile dependency court without the philosophical orientation or logistical infrastructure and resources of the latter court. The following recommendations are intended to address this problem

and equip the family court to carry out its expanded responsibilities.

RECOMMENDATIONS FOR BETTER EQUIPPING FAMILY COURT TO ACCOMPLISH THE TASKS ASSIGNED BY THE FAMILY CODE

Judicial training. Judicial officers expert at implementing the provisions of child custody and visitation law should not be expected to correctly apply that law to issues of child abuse and neglect, substance abuse, and domestic violence without background education and training sufficient to give them a fundamental understanding of the definitions, dynamics, and impact of these issues on families and children. Therefore:

1. Judicial officers, before their appointment to the family court bench, should be required to have training in child abuse and neglect, domestic violence, substance abuse, serious mental health problems, child development and attachment theory, the impact of divorce on children and families, the developmental appropriateness of various custody and time-sharing schedules, and local community resources that is sufficient to allow them to
 - a. knowledgeably interpret and weigh the significance of the various allegations and issues raised in child custody cases
 - b. respond appropriately and sensitively to parties affected by these issues
 - c. accurately appreciate the impact of these issues on the safety and development of children, so that they may shape their orders in the most appropriate manner
 - d. objectively and appropriately consider and assess recommendations made by mental health and other family court professionals regarding the custody and visitation of children
 - e. order the parties to seek and obtain the most appropriate available services aimed at reducing

the various risks associated with the presenting problems

This background training should not be intended to make judicial officers experts in these various areas; rather, it should be sufficient to prevent decision making that inadvertently endangers children or other family members. The training should also better equip judicial officers to objectively consider and determine the appropriateness of child custody and visitation recommendations made by Family Court Services and other mental health professionals. The provision of this training would help dispel the impression that judicial officers simply “rubber-stamp” custody and visitation recommendations.

Grant funding. The large number of child custody and visitation cases and the size of the court in some locales may present the need and opportunity for creating areas of specialization within the family court system. In addition, courts should actively seek and obtain grant funds that may be available to give the court the support services necessary to make these judicial interventions effective. A number of courts around California are beginning to do so. One such court is the Santa Clara Family Court, which has collaborated with adjacent counties and courts to obtain grants from the Judicial Council of California, Administrative Office of the Courts, and the U.S. Department of Justice, Office on Violence Against Women, to support current supervised visitation programs and develop model supervised visitation programs for domestic violence cases. The Santa Clara court has also obtained California Collaborative Justice Drug Courts Substance Abuse Focus grants, a Health Trust Good Samaritan grant, and a FIRST 5 Santa Clara County grant, all to develop and support a family drug treatment court and related coordinator and family court resource specialist positions.

In another very significant and pioneering move, the Santa Clara Family Court sought, received, and is implementing a substantial multiyear grant from FIRST 5 Santa Clara County, the “Care Management Initiative—Family Court Services.” This project’s

purpose, as stated in the project overview, is to “ensure that children and families within the Family Court system will have the necessary health, developmental, and social underpinnings to assist their success in life.” The project aims to coordinate prevention, intervention, and intensive intervention services for young children (prenatal through 5 years old) and their families either when parents voluntarily request services or when the court has ordered them to obtain services. Additional goals of the project include fostering community collaboration to enable the coordination and integration of existing services and infrastructures, identifying and addressing gaps in needed services, and, by accomplishing the other goals, preventing these families from entering juvenile dependency court.

2. Local jurisdictions should, whenever necessary and possible, consider establishing specialized family courts (i.e., family violence courts and drug treatment courts) that provide the monitoring necessary to protect the safety and best interest of children and the safety of all family members. In addition, local courts should actively seek to acquire supportive services and resources to help families address the problems that are jeopardizing the healthy development of their children or the safety of other family members.

Advocacy. Family court currently is limited in its ability to monitor the health, safety, and welfare of children in high-risk situations who are not receiving services from child welfare departments. The court can, however, appoint an attorney to represent a child to seek affirmative relief on behalf of the child; to have access to the child’s medical, mental health, health care, and educational records; and to interview care providers.⁵⁷ The attorney can also report concerns about child abuse or neglect to the child welfare agency and is legally entitled to reasonable access to the child. Attorneys who have expressed interest in representing children and who have demonstrated their interest by seeking out the education and training of the type suggested for judicial officers should be considered for such service to

children and the court. Some courts that have appointed CASAs for children in high-risk situations have also successfully increased the level of monitoring and service provision for these children.

- 3a. Family court judicial officers should strongly consider appointing attorneys to represent children in cases in which both parents, or all the parties, are experiencing problems (e.g., child abuse or neglect, substance abuse, domestic violence) of such severity that the children at issue have been harmed or are at significant risk of being harmed; the court is persuaded that no party is capable of adequately caring for or protecting the children; and the family and children are not receiving services or monitoring from the local child welfare agency.
- 3b. The Judicial Council should establish training requirements for attorneys representing children in family court cases sufficient to allow them to advocate effectively for their safety and best interest. (The training should cover the subject areas listed in recommendation 1.)
4. CASA programs should be authorized and funded to serve family court where children are determined to be at high risk. Specialized training programs should be designed for family court CASA programs.

Social-work services. Interested and motivated CASAs and attorneys appointed to represent children are often asked to provide services usually offered by trained social workers in child protection agencies. When this is the case, it may be more efficient and effective to provide those social-work services directly. Therefore:

5. Consideration should be given to authorizing family courts or Family Court Services to provide high-risk families with social-work services aimed at guarding the health, safety, and welfare of children; improving parenting capacity; and trying to keep children with their families in the community and out of the juvenile dependency system.

Information exchange. It is critical that high-risk families be in the court or court-related forum most appropriate for addressing their needs, and that when families are involved in both family and juvenile court, other courts, and related agencies, mechanisms that promote the timely exchange of information are in place.

6. Every jurisdiction should have efficient and effective protocols providing for the timely and efficient exchange of information between all the court and government systems with which families are involved, and for the efficient and effective collaboration between family courts or Family Court Services and local child protection agencies.

SUMMARY AND CONCLUSION

Many family court child custody and visitation cases involve child abuse or neglect, domestic violence, or substance abuse. These place children at increased risk of emotional, behavioral, relationship, and cognitive problems. The California Family Code recognizes the seriousness of these social problems by assigning them special weight in its definition of the *best interest* of children and by authorizing the family court to order parents to participate in educational, counseling, and supervision programs.

Family court, by tradition and structure and as currently organized, is not designed to deal effectively with these types of problems, especially when both parents are experiencing difficulties that leave them unable to care for their children. The court system has a responsibility to understand the nature and complexity of these problems and their impact on children and families; to appropriately use the powers and authority given to it to identify and effectively address these problems; to assist families in obtaining needed services; and to monitor and enforce the court-ordered conditions imposed by the need to preserve the health, safety, and welfare of the children and the safety of other family members.

Family court is not juvenile dependency court, but it must deal with similar issues in many of the

cases before it. Family court, when doing this job effectively in serious cases, can help keep children safe and allow them to live with their families in the community, out of the juvenile dependency system. But reaching this goal requires that the family court develop a philosophical orientation and logistical infrastructure and acquire the resources to effectively confront the serious problems occurring in families—particularly child abuse and neglect, domestic and relationship violence, and substance abuse—when these problems have not risen to the level of a juvenile dependency action.

NOTES

1. See CAL. FAM. CODE § 3020(c) (West 1994 & Supp. 2003).
2. Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 204–08 (1987).
3. See *id.* at 204–06.
4. See *id.*
5. *Id.* at 208.
6. See CAL. FAM. CODE § 3183.
7. Santa Clara County Family Court requires all parties entering the family court system with litigated child custody or visitation disputes to attend a three-hour orientation class offered by Family Court Services. The class includes a lecture, an audio-visual presentation, and a video of children of divorce speaking about how the divorce and behavior of their parents have affected them. The class ends with a question-and-answer session. The Child Support Enforcement unit is available to provide information related to child support issues. Orientation booklets and various handouts are given to each client. These handouts include information on the various services located in the family court; domestic violence, its impact on children and family members, the rights of victims in mediation and investigation, and various services; the stages of divorce, loss, and related stressors commonly experienced by family members; the various developmental needs of children and the special needs and rights of children of divorce/separation; the protection of children from exposure to and involvement in destructive parental conflict and suggestions for diminishing conflict; concrete

dos and don'ts for parents and caretakers; approaches to parenting after separation or divorce and different parenting styles, i.e., co-parenting vs. parallel parenting; the mediation process from beginning to end; the various types of investigations the court may order if the parents fail to reach an agreement; related logistical, procedural, and financial considerations; and community resources. From 20 to 25 percent of all Santa Clara County cases whose parties attend orientation resolve without the need for further court intervention.

8. See *infra* notes 33–35 and accompanying text.

9. See CAL. FAM. CODE § 3011 (enumerating factors to be used to determine the best interest of the child in most family court proceedings).

10. See *id.* §§ 3020, 3031, 3046, 3100.

11. See *id.* §§ 1816, 3011, 3020–3021, 3022.5, 3027, 3027.5, 3030–3031, 3041, 3044–3046, 3064, 3100–3101, 3103, 3110.5–3111, 3113, 3117–3118, 3162, 3170, 3181, 3190, 3200–3201 (First Enacted Section), 3201 (Second Enacted Section), 6210, 6303.

12. *Id.* § 3011.

13. See *id.* § 1815.

14. See *id.* § 1816.

15. See CAL. R. CT. 5.230 (2003).

16. See *id.* 5.215.

17. See *id.* 5.225.

18. See *id.* 5.220.

19. CAL. FAM. CODE § 3011(e)(1).

20. Sections 6203 and 6211 of the Family Code effectively define *domestic violence* in California as intentionally or recklessly causing or attempting to cause bodily injury, committing sexual assault, placing a person in reasonable apprehension of imminent serious bodily injury to that person or another, or engaging in any behavior that has been or could be enjoined by an order enjoining a party from assault and harassment, perpetrated against any of the following: a current or former spouse, cohabitant, or partner in a dating relationship; a person with whom the perpetrator has had a child; a child of a party; or any other person related by blood or marriage within the second degree. See CAL. FAM. CODE §§ 6203, 6211.

21. See CAL. FAM. CODE § 3041.

22. See *id.* § 3020.

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NOTES 23. *See id.* § 3020.

24. *See id.* § 3044.

25. *See id.* § 3027.

26. *See id.* § 3118.

27. *See id.* § 3110.5; CAL. R. CT. 5.225 (2003). The code permits but does not require the court to order an evaluation or investigation when allegations of other types of child abuse arise. *See* CAL. FAM. CODE § 3118(a).

28. *See id.* § 3190.

29. *See id.* § 3191.

30. *See id.* § 3200.

31. *See* CAL. STDS. JUD. ADMIN. § 26.2 (2003).

32. *See* CAL. FAM. CODE § 3203.

33. CTR. FOR FAM., CHILDREN & THE COURTS, JUD. COUNCIL OF CAL., PREPARING COURT-BASED CHILD CUSTODY MEDIATION SERVICES FOR THE FUTURE: STATEWIDE UNIFORM STATISTICAL REPORT SYSTEM, THE 1996 CLIENT BASELINE STUDY 6–10 (Sept. 2000). “In 1996, concerns about child neglect were raised in 16 percent ... of the mediation sessions. Physical abuse of the child was raised in 7 percent of all sessions. Sexual abuse of the child came up in 3 percent of all mediations. Parental abduction of the child was a concern in 6 percent of all cases.... Parents in 30 percent of all families brought up concerns about domestic violence in their custody deliberations....” *Id.*

34. *Id.*

35. COMM’N ON THE FUTURE OF THE CAL. CTS., JUSTICE IN THE BALANCE: 2020, at 122–26 (Jud. Council of Cal. 1993).

36. JOHN E.B. MYERS ET AL., THE APSAC HANDBOOK ON CHILD MALTREATMENT (Sage Publ’ns 2d ed. 2002).

37. Jeffrey L. Edleson, *Problems Associated With Children’s Witnessing of Domestic Violence*, VAWNET APPLIED RESEARCH FORUM 1 (Apr. 1999), at www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_witness.pdf.

38. *Id.* at 1–2.

39. *Id.* at 2–3.

40. *Id.* at 4.

41. *In re Benjamin D.*, 278 Cal. Rptr. 468, 472 n.5 (Cal. Ct. App. 1991).

42. *In re Heather A.*, 60 Cal. Rptr. 2d 315, 321–22 (Cal. Ct. App. 1996). *See also In re Sylvia R.*, 64 Cal. Rptr. 2d 93, 94–95 (Cal. Ct. App. 1997).

43. *See* E.M. Bennett & K.J. Kemper, *Is Abuse During Childhood a Risk Factor for Developing Substance Abuse Problems as an Adult?*, 15 J. DEV. & BEHAV. PEDIATRICS 426 (1994); Mark Chaffin et al., *Onset of Physical Abuse and Neglect: Psychiatric, Substance Abuse, and Social Risk Factors From Prospective Community Data*, 20 CHILD ABUSE & NEGLECT 191 (1996); Paula K. Jaudes et al., *Ass’n of Drug Abuse & Child Abuse*, 19 CHILD ABUSE & NEGLECT 1065 (1995); Kelly Kelleher et al., *Alcohol and Drug Disorders Among Physically Abusive and Neglectful Parents in a Community-Based Sample*, 84 AM. J. PUB. HEALTH 1586 (1994); Susan J. Kelley, *Stress and Coping Behaviors of Substance-Abusing Mothers*, 3 J. SOC. PEDIATRIC NURSES 103 (1998); J. Michael Murphy et al., *Substance Abuse and Serious Child Mistreatment: Prevalence, Risk, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 197 (1991); Diana R. Wasserman & John M. Leventhal, *Maltreatment of Children Born to Cocaine-Dependent Mothers*, 147 AM. J. DISEASES CHILD. 1324 (1993).

44. NANCY PEDDLE & CHING-TUNG WANG, CURRENT TRENDS IN CHILD ABUSE PREVENTION, REPORTING, AND FATALITIES: THE 1999 FIFTY STATE SURVEY 14 (Prevent Child Abuse America 2001).

45. NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS (1999).

46. Robert T. Ammerman et al., *Child Abuse Potential in Parents With Histories of Substance Abuse Disorder*, 23 CHILD ABUSE & NEGLECT 1225 (1999).

47. Richard Famularo et al., *Parental Substance Abuse and the Nature of Child Maltreatment*, 16 CHILD ABUSE & NEGLECT 475 (1992).

48. This is a subset of those cases in which there is or has been a restraining order, the children have witnessed domestic violence, at least one parent has a substance abuse problem, or a history of CPS investigation exists. *See supra* text accompanying note 32.

49. *See* CAL. FAM. CODE § 3150 (West 1994 & Supp. 2003).

50. Santa Clara County Family Court Services requested appointment of a children’s attorney in approximately 8 percent of litigated child custody and visitation disputes referred for mediation in 1998.

51. For examples of situations justifying dependency court jurisdiction, see CAL. WELF. & INST. CODE § 300 (West 1998 & Supp. 2003).

52. See CAL. R. CT. 1424 (2003).

53. See Barrett J. Foerster, *Children Without a Voice*, 42 JUV. & FAM. CT. J. 9 (Fall 1991).

54. The grant provided a total of approximately 20 volunteer assignments over a period of 24 months. Family Court Services could request that the court order a case assigned to a CASA volunteer. FCS usually made these requests in cases where it had determined that both parents (or all parties) were experiencing serious difficulties that kept them from being able to adequately care for or protect their children; the children were in jeopardy related to issues of child abuse or neglect, substance abuse, domestic violence, or lack of appropriate medical care, or there was extremely low parental functioning; and the child welfare department was not providing services.

55. The author received the request and provided the training.

56. Santa Clara's Juvenile Court, too, has taken steps to ensure communication and cooperation among courts and related agencies handling family matters. For example, the local Juvenile Rules of Court provide: "The Court hereby finds that the best interests of children and victims appearing before the Juvenile, Family, Criminal and Probate Courts, the public interest in avoiding duplication of effort by the Courts and by the investigative and supervisory agencies serving the Juvenile court or court serving agency outweighs the confidentiality interest reflected in Penal Code Sections 11167 and 11167.5, Welfare and Institutions Code Section 827 and 10850, Family Code section 1818, and Probate Code Section 1513, and therefore good cause exists for..." exchanging verbal and written information between Family Court Services, the Juvenile Probation Department, the Department of Family and Children's Services, the Adult Probation Department, and the Probate Court Investigator's staff.

57. See CAL. FAM. CODE § 3151 (West 1994 & Supp. 2003).

